

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 WILLIAM LEONARD PICKARD,

11 No. C 06-00185 CRB

12 Plaintiff,

13 v.
14 **ORDER DENYING
ADMINISTRATIVE MOTION TO
SET A FURTHER CASE
MANAGEMENT CONFERENCE**

15 DEPARTMENT OF JUSTICE,

16 Defendant.
17 _____ /

18 Plaintiff William Pickard has filed an Administrative Motion asking the Court to set a
19 case management conference. See generally Admin. Mot. (dkt. 271). The Motion asserts
20 that, while the Court's November 15, 2016 Order Granting Motion for De Novo Review and
21 Holding that Government May Withhold Materials (hereinafter "Order") (dkt. 268) resolved
22 some of the issues in this case, it did not resolve all of them. Id. Pickard argues that the
23 Order only resolved the parties' dispute about three categories of materials (DEA informant
24 Gordon Skinner's name, his NADDIS number, and the information Skinner voluntarily
25 disclosed to the public), but did not "countenance the government's decision to withhold
26 every word from every page of hundreds of pages of responsive records." Id. at 1. Pickard
27 asks for a CMC "so that the parties may seek the Court's guidance concerning further
28 briefing and resolving the remaining issues in the case." Id. at 2. The government responds
that there is nothing left for the Court to decide, and asks the Court to direct entry of

1 judgment in its favor. See generally Opp'n (dkt. 272).

2 **I. Procedural History**

3 Resolving the parties' latest dispute requires a (further) recitation of the extensive
4 procedural history of this case.¹ In January 2005, Plaintiff submitted a request to the DEA,
5 seeking information and documents pertaining to Skinner. D 4th MSJ (dkt. 184) at 2.
6 Specifically, he sought any information on

7 (1) Skinner's criminal history (including records of arrests, convictions, warrants, or
8 other pending cases), (2) records of all case names, numbers, and judicial districts
9 where he testified under oath, (3) records of all monies paid in his capacity as a
10 federal government informant, (4) all records of instances where the DEA intervened
11 on his behalf to assist him in avoiding criminal prosecution, (5) all records of
12 administrative sanctions imposed for dishonesty, false claims, or other deceit, (6) all
13 records of any benefits of any nature conferred, (7) all records of deactivation as a
14 confidential informant and the reasons for deactivation, and (8) all records concerning
15 Skinner's participation in criminal investigations.

16 Id. In February 2005, the DEA denied this request, citing FOIA Exemptions 6 and 7(C),
17 without confirming or denying the existence of any records about Skinner. Id. The Office of
18 Information and Privacy upheld that response. Id.

19 In 2006, Plaintiff brought suit in this court. Id. The government moved for summary
20 judgment, and, in 2007, the Court denied the motion without prejudice, holding that the DEA
21 had not adequately demonstrated that a Glomar response (a refusal to confirm or deny the
22 existence of records pertaining to an individual) was appropriate. Order Denying MSJ (dkt.
23 62) at 5–6. The government then brought a second motion for summary judgment, fully
24 briefing the Glomar response issue. See Pickard v. Dep't of Justice, 653 F.3d 782, 784–85
25 (9th Cir. 2011). The Court granted that motion in 2008, finding that Skinner's identity as a
26 confidential informant had not been "officially confirmed" under the Privacy Act, and that a
27 Glomar response was appropriate under Exemptions 7(C) and 7(D). Id. at 785.

28 In July 2011, the Ninth Circuit reversed and remanded, holding that, because the
29 government had publicly disclosed Skinner's status as a confidential informant in open court
30 in the course of official proceedings, a Glomar response was no longer appropriate. Id. at

¹ The Court borrows heavily from its last Order in relaying the procedural history herein. See Order at 2–5.

1 787–88. The court explained, “[t]his is not to say that the DEA is now required to disclose
2 any of the particular information requested by Pickard.” Id. at 788. The government was to
3 produce a Vaughn index, “raise whatever other exemptions may be appropriate, and let the
4 district court determine whether the contents, as distinguished from the existence, of the
5 officially confirmed records may be protected from disclosure under the DEA’s claimed
6 exemptions.” Id.

7 In March 2012, the government filed its third Motion for Summary Judgment but did
8 not file a Vaughn index. See generally D 3rd MSJ (dkt. 140). Plaintiff filed a cross-motion
9 for summary judgment. See generally P 3rd MSJ (dkt. 152). The Court denied both motions
10 and ordered the government to file a Vaughn index within 5 days. See Minutes (dkt. 165).
11 The government did so. See Vaughn Index (dkt. 166).

12 In January 2014, the government filed a fourth motion for summary judgment as to all
13 of the records at issue. See D 4th MSJ at 1 (“Did the Drug Enforcement Administration . . .
14 properly withhold the requested documents under applicable FOIA exemptions?”). Pickard
15 cross-moved for partial summary judgment, requesting release of three categories of
16 information. See P 4th MSJ (dkt. 188) at 1 (“Pickard seeks partial summary judgment for
17 withholdings that are demonstrably improper, even on the meager factual basis the agency
18 now provides. These withholdings include Skinner’s name, information Skinner has
19 voluntarily disclosed to the public, and his NADDIS number.”). In May 2014, the Court
20 denied the government’s fourth motion for summary judgment after finding its Vaughn index
21 “supremely unhelpful.” MSJ Order (dkt. 198) at 1, 7, 11. The Court also denied Pickard’s
22 cross-motion. Id. at 11. The Court found that without an adequate Vaughn index, “the Court
23 [could not] know if releasing something as basic as Skinner’s name would compromise an
24 important privacy interest, endanger any individual’s (including Skinner’s) physical safety,
25 or run afoul of one of the other claimed exemptions.” Id. at 9. The Court then ordered the
26 government “to submit (1) an adequate Vaughn index and (2) all of the responsive
27 documents that the government continues to withhold in full or in part to Magistrate Judge
28 Nathanael Cousins for review of ‘whether the contents, as distinguished from the existence,

1 of the officially confirmed records may be protected from disclosure under the DEA's
 2 claimed exemptions." Id. at 11 (citations omitted).

3 Judge Cousins understood his task as determining "whether, per Pickard's request, the
 4 Court should release three categories of materials in the 325 documents." Cousins Order
 5 (dkt. 243) at 1.² Following an in camera review, he ordered the three categories of materials
 6 released. Id. at 1–2, 4.³ The government then sought de novo review of the Cousins Order.
 7 See Motion for De Novo Review (dkt. 244); Order Terminating Motion (dkt. 255); 2d Mot.
 8 for De Novo Review (dkt. 260).⁴ The parties and the Court understood that the Second
 9 Motion for De Novo Review was only about the three categories of materials at issue in the
 10 Cousins Order.⁵ The Court even observed in its Order that Pickard's only seeking "the three
 11

12 ² See also 11/16/15 Letter from Pickard's counsel to Judge Cousins (dkt. 223) (opining that in
 13 camera review of withheld records was ripe for court's consideration, and relying on briefing from
 Cross-Motion for Partial Summary Judgment (dkt. 188) and Reply (dkt. 191)).

14 ³ The government notes that the Cousins Order provided that "the government may redact any
 15 part of the 325 documents that is not responsive to this order." Opp'n at 2 (citing Cousins Order at 1).
 16 The government argues that it "objected to the portion of [the Cousins Order] requiring disclosure, but
 17 not to the portion allowing the government to redact the other materials," and that, because Pickard did
 18 not object to the Cousins Order, it is too late for him now to argue that he is entitled to any of the other
 materials not covered by the three categories. Id. at 2. The Court rejects this argument. It makes little
 sense for Pickard to have objected to the Cousins Order, as it granted Pickard relief as to the only three
 categories of material that were at issue.

19 ⁴ The government also argues that it warned Pickard "in its first request for de novo review" that
 20 "to the extent Plaintiff suggests he may seek the release of additional information later, he cannot,
 21 because he did not object to the Magistrate Judge's order holding that only information in the Three
 22 Categories must be released and that other information may be redacted."). See Opp'n at 2 (citing Reply
 23 re D. Mot. De Novo (dkt. 247) at 5 n.2). Again, the Court would not have expected Pickard to object
 to the Cousins Order. Moreover, a warning located in a footnote in the Reply brief that the Court later
 struck carries little weight with the Court. Nor does the government's assertion that "Plaintiff did not
 respond to this point in his opposition," see Opp'n at 2, given that the government made the point in its
 Reply.

24 ⁵ See 2d Mot. for De Novo Review at 1 ("Specifically, Defendant requests that the Court
 25 determine de novo whether documents in the following three categories . . . must be released, and rule
 26 that they are properly withheld."); id. at 22 ("this Court should review de novo the [Cousins Order's]
 27 requirement to release documents in the Three Categories, and rule those documents may be withheld.");
 28 P Opp'n to 2d Mot. for De Novo Review (dkt. 264) at 1 (" . . . warrants disclosure from the withheld
 records of three narrow categories of information"); id. at 25 ("Mr. Pickard respectfully urges the Court
 to order the disclosure of the Three Categories of information from the withheld records."); Reply re
 2d Mot. for De Novo Review (dkt. 265) at 1 ("The Court should hold de novo that documents in the
 Three Categories are properly withheld."); Order at 6 ("The government argues that Judge Cousins erred
 in ordering the release of the three categories of material sought."); id. at 24 (concluding that the
 government could withhold the three categories of materials).

1 categories that he [did made] the Court's task unusual. . . . [and] more difficult." See Order
 2 at 2.⁶

3 **II. Discussion**

4 The Court therefore accepts Pickard's contention that the Order only adjudicated
 5 whether the government could withhold the three categories of materials. See Admin. Mot.
 6 at 1. But the Court rejects Pickard's suggestion that, having chosen to pursue disclosure of
 7 only a subset of all of the materials responsive to his initial FOIA request, he may now
 8 pursue other subsets.

9 FOIA cases are almost always resolved on summary judgment, rather than trial. See
 10 Animal Legal Defense Fund v. U.S. F.D.A., 836 F.3d 987, 989 (9th Cir. 2016) ("Most FOIA
 11 cases are resolved by the district court on summary judgment, with the district court entering
 12 judgment as a matter of law."); Lawyers' Comm. for Civil Rights of S.F. Bay Area v. U.S.
 13 Dep't of the Treasury, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008) ("As a general rule, all
 14 FOIA determinations should be resolved on summary judgment.").⁷ Plaintiff chose to file a
 15 motion for partial summary judgment. "Partial motion for summary judgment is a
 16 mechanism through which the court deems certain issues established before trial," and is
 17 "'intended to avoid a useless trial of facts and issues over which there was never any
 18 controversy. . . .'" See Holguin v. City of San Diego, 135 F. Supp. 3d 1151, 1158 (S.D. Cal.
 19 2015) (quoting Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981)). Pickard
 20 had no reasonable expectation that the remaining materials—those not falling within the
 21 three categories—would be the subject of a FOIA trial.

22 Instead, Pickard made a strategic decision to pursue what he perceived to be low-
 23 hanging fruit: Skinner's name, NADDIS number, and information Skinner voluntarily
 24 disclosed. See P 4th MSJ at 1 ("Pickard seeks partial summary judgment for withholdings

25
 26 ⁶ The Court also noted repeatedly that while Pickard sought materials that "Skinner has
 27 voluntarily disclosed to the public," the Court did "not know which portions of which documents
 28 represent [such] material." See id. at 2, 9, 19, 20.

⁷ The exception to the standard practice of resolving FOIA cases by summary judgment is that
 "some FOIA cases require resolution of disputed facts." Animal Legal Defense Fund, 836 F.3d at 989.
 Pickard has not demonstrated that this FOIA case required resolution of disputed facts.

1 that are demonstrably improper, even on the meager factual basis the agency now
 2 provides.”). Whether he intended to move subsequently for partial summary judgment on the
 3 remaining materials, see Joint Case Management Statement of 3/2/16 (dkt. 236) at 4
 4 (Plaintiff’s Statement: “Following the government’s compliance with [Judge Cousins’s
 5 tentative order requiring disclosure of the three categories], the parties should meet and
 6 confer to determine if further litigation will be necessary and, if so, whether it is possible to
 7 narrow the issues or documents that remain in dispute”), is of no matter.⁸ He has not done
 8 so. Nor does this Court permit the *seriatim* filing of motions for summary judgment. See
 9 Standing Order of 6/11/15 (“Each party is limited to filing one summary judgment motion.”).

10 In sum, Pickard chose to seek three categories of materials. The Court ruled on those
 11 three categories of materials. Pickard has not renewed his request for the remaining
 12 materials, even though the government has claimed throughout this litigation a right to
 13 withhold them. The Court hereby considers Pickard’s request for the remaining materials
 14 withdrawn, and will separately enter judgment for the government. Pickard may appeal the
 15 Order on the three categories if he wishes to do so.

16 The Administrative Motion is DENIED.

17 **IT IS SO ORDERED.**

18
 19 Dated: February 13, 2017



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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 24 ⁸ The Court recognizes that—by virtue of Pickard’s framing—its Order had to reach a
 25 conclusion on Exemption 7(D) in the absence of any “particularly relevant precedent from the Ninth
 26 Circuit.” See Order at 12–13 (noting that neither Ninth Circuit case “involves a confidential informant
 27 who has testified in criminal proceedings and disclosed some information.”). The Ninth Circuit might
 28 still disagree with this Court’s conclusion on appeal. But assuming that the Court is correct as to the
 application of Exemption 7(D) to information Skinner has publicly disclosed, see Order at 19 (“Because
 this Court finds persuasive the numerous courts to focus on whether information was originally given
in confidence, regardless of whether or not that information later becomes public, this Court holds that
 Exemption 7(D) justifies the withholding of Skinner’s name and the information he has publicly
 disclosed.”), then it follows a *fortiorari* that Pickard is not entitled to the information Skinner has not
 publicly disclosed.